

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DURAN IRVIN,)
Plaintiff,)
)
v.) C.A. No. 04-10033-REK
)
ANDREA CABRAL, et al.)
Defendants.)

MEMORANDUM AND ORDER

For the reasons stated below, the Court allows plaintiff's Motion for Voluntary Dismissal without assessment of the filing fee.

BACKGROUND

On December 29, 2003, plaintiff Duran Irvin, now incarcerated at the Suffolk County Jail and House of Correction, filed his self-prepared civil rights complaint. Because plaintiff filed his complaint without prepayment, he was granted additional time to either pay the \$150.00 filing fee or file an Application to Proceed Without Prepayment of Fees. See 1/21/04 Memorandum and Order, Docket No. 7. Plaintiff was advised that if he pays the fee or files an Application to Proceed Without Prepayment of Fees, his complaint is subject to preliminary screening pursuant to 28 U.S.C. §§ 1915, 1915A. Id.

On February 3, 2004, plaintiff filed an Application to Proceed Without Prepayment of Fees ("Application"). See 2/3/04 Application, Docket No. 11. Because plaintiff failed

to provide a certified copy of his trust fund account statement as required by Section 1915(a)(2), his Application was denied without prejudice to refiling with a copy of his certified prison account statement within forty-two days. See 4/6/04 Memorandum and Order, Docket No. 13.

Now before the Court is plaintiff's one-page motion seeking to voluntarily dismiss this action. See 4/13/04 Motion, Docket No. 14.

DISCUSSION

A motion for voluntary dismissal in the federal system is controlled by Federal Rule of Civil Procedure 41(a). See Fed. R. Civ. P. 41(a)(1)-(2). Under Rule 41(a)(1), a plaintiff can voluntarily dismiss an action without order of the court by filing either a notice of dismissal before the defendant files an answer, or a stipulation of dismissal signed by all parties. Fed. R. Civ. P. 41(a)(1). Rule 41(a)(1) provides in part that:

an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action.

Fed. R. Civ. P. 41(a)(1).

Additionally, because plaintiff is incarcerated, he is

subject to the fee-paying provisions of the Prison Litigation Reform Act. See 28 U.S.C. §§ 1915(b)(1), 1915(e)(2). At least one court has recognized that once prisoners are allowed "to proceed in forma pauperis, they owe the United States of America the full filing fee, and this is true even if they voluntarily dismiss their cases." See Copley v. Henderson, 980 F. Supp. 322, 323 (D. Neb. 1997); Cf. Sumner v. Tucker, 9 F. Supp. 2d 641, 643 (E.D. Va. 1998) (dismissing without prejudice a prisoner's Section 1983 action upon plaintiff's motion for voluntary dismissal, while at the same time disposing of the action as frivolous under 28 U.S.C. § 1915(g) when the Court had expended significant time and resources reviewing plaintiff's claims).

Here, the Court denied plaintiff's Application without Prejudice and has not yet reviewed the merits of plaintiff's claims. Because plaintiff is seeking to withdraw this action at such an early stage, this action may be dismissed by plaintiff without order of the Court and without assessment of the filing fee.

ORDER

For the foregoing reasons, it is hereby ORDERED

1. Plaintiff's Motion for Voluntary Dismissal (Docket No. 14) is ALLOWED.
2. The Clerk is directed to enter as a separate document a final judgment as follows:

This civil action is DISMISSED without prejudice
and without assessment of the filing fee.

SO ORDERED.

Dated at Boston, Massachusetts, this 15th day of April, 2004.

/s Robert E. Keeton

ROBERT E. KEETON
UNITED STATES SENIOR DISTRICT

JUDGE